STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2003B134**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JULIE MARBLE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, COLORADO TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on August 6, 2003 and September 15, 2003 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. After filing written closing arguments, the record was closed on October 14, 2003. Assistant Attorney General Andrew M. Katarikawe represented Respondent. Respondent's advisory witness was James Abbott, the appointing authority. Complainant appeared and was represented by Vonda G. Hall.

MATTER APPEALED

Complainant, Julie Marble ("Complainant" or "Marble") appeals her demotion by Respondent, Department of Corrections, Colorado Territorial Correctional Facility ("Respondent," "DOC" or "Territorial"). Complainant seeks rescission of the disciplinary action and an award of attorney fees. Respondent seeks an affirmance of the disciplinary action and an award of attorney fees.

For the reasons set forth below, Respondent's action is **affirmed, with clarification as to Complainant's ability to apply for a promotion.**

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant is a certified employee who, prior to this matter, held the position of Information Technician II.

2. Complainant was the Local Access Network ("LAN") Coordinator at Canon Minimum Centers ("CMC") for six years. Her duties as LAN Coordinator entailed all computer issues for CMC, including networking, set-up, maintenance and troubleshooting, and gave her access to all information on the computer system.

3. Donice Neal is the Warden at CMC. Neal supervised Fran Wilson, her administrative assistant. Wilson directly supervised Complainant.

Complainant's Access to Neal's E-mail

4. A few years ago, when wardens at the various DOC facilities were set-up with email access, Jerry Gasko, a regional director for DOC at the time, asked that wardens set up some type of process whereby the wardens' email would be checked when the wardens were not at their facilities. Neal asked Complainant to have Neal's emails sent to Neal's administrative assistant, Fran Wilson. Complainant told Neal that she would have the emails sent to Complainant and she would then forward them to Wilson.

5. Complainant kept, by monthly file, copies of Neal's e-mails. On occasion, when Neal had deleted an email and needed to review it again, Complainant was able to retrieve a copy of that email for Neal.

6. Neal received copies of the minutes of DOC's Executive Team meetings via email and took notes at DOC's Warden meetings. She would share those minutes and her notes with her management team. Minutes of the Wardens' Meetings are posted on DOC's electronic information board after they have been approved.

7. During February and March 2003, DOC was informed by the legislature that DOC would have to layoff some employees. This news was public and created a stressful employee environment with low morale.

8. DOC also received a legislative mandate to centralize its IT functions. Neal was the warden in charge of collecting information from the other wardens regarding this consolidation and relaying that information to L. D. Hay, who was in charge of DOC's IT

systems and was overseeing the centralization of those functions. The centralization of those functions directly affected Complainant.

9. After discussion with the CMC management staff, Neal had notified DOC headquarters, via email, which CMC employees she was recommending should be laid off. Fred Gifford, a Maintenance Captain at CMC, was one of those employees.

10. Complainant knew that Gifford's position was being recommended as part of the layoff because she had seen the information in one of Neal's emails and it was also in a document that Complainant read when it was laying out on top of Neal's desk. She discussed Gifford's possible layoff with another DOC employee.

11. Soon after Neal emailed her recommendations regarding layoffs, Gifford approached Neal to ask her if it was true that he was going to be laid off. Neal did not ask Gifford where he obtained the information about his possible layoff but she was angry about the leak of her recommendation and confronted her management staff, accusing them of leaking the information.

12. Other employees approached Neal to ask if their positions were going to be abolished, as opposed to Gifford who asked for confirmation from Neal of what he had heard about his particular position.

13. Approximately one week after her discussion with Gifford, Neal got a call at home from Hay. Hay told Neal that he had heard from one of DOC's LAN Coordinators that Complainant had shared information from some of Neal's emails with other DOC employees and had forwarded some of Neal's emails to DOC employees. At least one email that was forwarded was between Hay and Neal and concerned the centralization of DOC's IT functions.

14. On the evening of March 19, 2003, Hay and John Jubic, a member of the IT staff at DOC's headquarters, met Neal at CMC and took possession of Complainant's computer and disks in her office. Hay and Jubic accessed both Complainant's and Neal's computers and showed Neal that Complainant had forwarded at least one of Neal's emails regarding the centralization of DOC's IT functions, had set up computer files of Neal's emails and was, on a routine basis, accessing Neal's email.

15. The email that was forwarded did not contain any type of notation by the original sender that it was sensitive or confidential or that it should not be forwarded. That email contained information regarding the IT centralization. The information was discussed at a managers' meeting and, after a draft of the meeting minutes was approved, would have been posted on DOC's internal website accessible to all DOC employees.

16. The following morning, Neal gave Complainant a memo informing Complainant that she was being put on administrative leave with pay. Neal verbally informed Complainant that she had inappropriately accessed information and forwarded it.

Complainant appeared surprised at the information.

17. After the confiscation of Complainant's computer, Neal contacted Mike Rulo, DOC's Inspector General, and informed him of what had happened. Rulo assigned an IG investigator, Investigator Flint, to the matter.

18. Complainant met with Investigator Flint and discussed with him for an hour and a half to two hours the allegations against her. During the interview she told Flint that she had discussed with an employee from Centennial Correctional Facility, on a couple of occasions, specific positions that were going to be cut. She also told him that she tried to "be careful" about giving information to others.

R-6-10 Meeting and Disciplinary Action

19. After placing Complainant on administrative leave with pay, Neal contacted Gene Atherton Assistant Director of Prisons for the Western Region, and requested that someone else be designated as appointing authority over this matter as she was personally involved in the issues. On March 31, 2003, Warden James Abbott was delegated appointing authority in this matter by Nolin Renfrow, Director of Prisons.

20. After being appointed, Abbott reviewed the investigative report prepared by DOC's IG office. Based upon that review he thought there were possible violations of DOC's administrative regulations, AR 1200-08 (prohibiting the dissemination of privileged information) and AR 1450-01 (Staff Code of Conduct), and the Governor's Executive Order on Ethics

21. On May 1, 2003, Abbott held an R-6-10 meeting with Complainant. Present at the meeting were Abbot, Complainant and Elizabeth Manzanares (Abbott's representative). The meeting was tape recorded and transcribed.

22. Complainant, prior to the R-6-10 meeting, knew what the allegations against her were because of her discussions with Flint. She felt comfortable at the R-6-10 to say whatever she needed to say in her defense.

23. During the meeting Complainant admitted that she had disclosed the contents of portions of Neal's emails to another DOC employee. She admitted that this was poor judgment on her part but that it was someone that she thought she could trust. Finally she stated that she thought that Neal's trust in her was "broken" and that it would be "very hard" to mend it.

24. During the R-6-10 meeting Complainant fully cooperated with Abbott and admitted to her conduct but did not present any mitigating factors. She referred to her unauthorized dissemination of the information in Neal's emails as "poor judgment" and that some of that information was privileged and some was information that was going to be read at roll calls. The Complainant admitted that Neal's trust in her was broken and that it

would be “very hard” to repair that trust.

25. Prior to this matter, Complainant has never received a disciplinary action. She had received a prior corrective action from a previous warden and a performance evaluation that incorporated the corrective action. Apart from that performance evaluation she has never received below an “average” on her performance evaluations.

26. Prior to imposing discipline, Abbott did not review Complainant’s personnel file, consider her prior evaluations or her disciplinary history nor did he consult with anyone regarding the substance of the allegations.

27. On May 6, 2003, by certified mail, Abbott notified Complainant that he was imposing “disciplinary action and demoting [Complainant] in rank to an Information Technology Technician I at $4016 per month effective May 1, 2003” as a result of her “blatant breach of trust,” her compromising her “integrity and effectiveness” and the possibility that her actions “could have directly affected the security, morale, and well being of staff.” As basis for the disciplinary action, he stated that she had violated AR 1200-08, Paragraph IV, (C)(2) and (3); AR 1450-01, Paragraph IV (N), (HH), (KK) and (ZZ); and the Governor’s Executive Department Code of Ethics, Paragraph 2(b), (d) and (i).

28. The demotion has resulted in a $411 monthly reduction in Complainant’s salary.

29. Abbott chose to impose a demotion because 1) Complainant’s violation of the rules had lead to a severe breach of trust between Complainant and Neal; 2) demotion would remove Complainant from working with Neal and allow her to work elsewhere at DOC where she could establish a positive relationship with her supervisor; and 3) a breach of security was involved in that Complainant created a stressful situation for Captain Gifford who, as a result of the stress, might cause a security issue.

30. Abbott considered Complainant’s honesty and her acknowledgment of her poor judgment, during the R-6-10 meeting, as mitigating factors when he decided on the level of discipline to impose.

31. Complainant timely filed her appeal in this matter.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;

(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) willful failure or inability to perform duties assigned; and
(4) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

In this *de novo* disciplinary proceeding, DOC has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

Complainant was disciplined for violating various DOC regulations and a Governor's Executive Order concerning access to and dissemination of confidential and/or sensitive information. The credible evidence supports the conclusion that Complainant had been authorized to have access to Neal's email. That access was limited to insuring that when Neal was not in the office that her email messages received the appropriate attention. Complainant's sharing of the information was not authorized and violated the parameters of her authorized access.

Complainant admitted freely in her R-6-10 meeting and again at hearing that she had in one way or another shared information she obtained from reviewing Neal's email and that she exercised poor judgment in doing so. The credible evidence established that Complainant committed the acts for which she was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in three ways, namely: (1) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (2) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (3) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

"The decision to take . . . disciplinary action shall be based on the nature, extent seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances." Board Rule R-6-6, 4 CCR 801. In this matter the appointing authority, Abbott, did not review Complainant's personnel file, including her prior disciplinary history or her previous performance evaluations. The hearing before the Board is a *de novo* hearing. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Evidence was presented and findings of fact were made as to Complainant's prior disciplinary history and her previous performance evaluations. Given the mandate of Board Rule R-6-6, it is in the context of this information, as well as the information considered by Abbott, that the decision to impose discipline is considered.

Mitigating circumstances, which should be considered, include Complainant's relatively clean disciplinary history, her previous performance evaluations and her willingness to own up to her lack of good judgment that resulted in the breach of trust. Aggravating factors include the position of trust in which Complainant was placed, the sensitive and confidential nature of the information she shared, the exacerbation of an already stressful environment which she created by leaking information about the layoffs and the impact of that stressful environment upon DOC's corrective facility environment. In addition, Abbott's goals in imposing the discipline should be considered. He stated that moving Complainant would allow her to develop a positive relationship with a new supervisor after her breach of trust with Neal.

The DOC regulations and Executive Order which Respondent disciplined Complainant for violating included the following:

1. AR 1200-08, Paragraph IV, (C)(2) and (3) which provide that access to another employee's mailbox be approved by the Assistant Director of Administration and Finance for the IT division and that those with broad access rights are not to browse through another employee's mailbox;
2. AR 1450-01, Paragraph IV (N), (HH), (KK) and (ZZ) which

prohibit conduct at any time that jeopardizes security or casts doubt upon staff's integrity, mandates compliance with DOC regulations, prohibits disclosure of information that would breach security or unduly endanger any person, and prohibits any conduct which reflects discredit upon an individual as staff; and

3. Governor's Executive Department Code of Ethics, Paragraph 2(b), (d) and (i) which mandates highest standards of personal integrity and prohibits against the disclosure of confidential information obtained in the course of employment for private gain and the engaging in any activity which affects public trust or creates a conflict of interest.

Under Board Rule R-6-9(2), an employee may be disciplined for violating department rules. Under § 24-50-116, C.R.S., an employee shall perform her duties and conduct herself in accordance with generally accepted standards, as well as those standards set by law, the Board or an appointing authority.

Complainant's admitted conduct violates the DOC regulations and the Governor's Executive Order regarding access to and dissemination of confidential or sensitive information. The information that she disseminated was sensitive. Complainant argues that there was no proof that Gifford learned of his possible layoff due to her disclosure of the information. While this may be true, the issue is whether she should have disseminated the information at all. Complainant was not a manager involved in the decision-making process and had absolutely no authority to discuss the information. Complainant also had no authority to forward the email concerning the IT centralization. Her behavior in that instance was analogous to photocopying someone else's mail and distributing copies of that mail. She was not the intended recipient in the case of either the layoff information or the IT centralization information. She was not a decision maker who had any type of authority over the distribution of either piece of information.

Complainant's access to Neal's email is analogous to the access that an administrative assistant or secretary would have to a senior manager's print mail. It is a generally accepted standard that such employees do not disseminate information that they receive in their clerical or administrative role. That standard is reflected in the Governor's Executive Code of Ethics and DOC's administrative regulations. Complainant, by discussing the information with another DOC employee and forwarding Neal's emails, has violated that generally accepted standard.

As admitted by Complainant, her conduct was poor judgment on her part. That poor judgment was a violation of generally accepted practices, a Governor's Executive Order and department regulations. Therefore, it was not arbitrary or capricious or contrary to rule or law to discipline Complainant.

C. The discipline imposed, with clarification as to Complainant's ability to apply for a promotion, was within the range of reasonable alternatives.

Complainant argues that the demotion imposed is a permanent demotion. Respondent did not respond to this characterization and the notice of disciplinary action is silent as to the permanence of Complainant's demotion. Under Board Rule R-6-9, disciplinary action may include, among other options, demotions or prohibitions of promotions or transfers for a specified period of time. If Respondent intended for Complainant's demotion to be permanent than that would violate that portion of the Board rule allowing prohibitions against promotions for only a specified period of time. Abbott stated in his testimony that he demoted Complainant in part so that she would no longer be working under Neal, would be transferred to another DOC position and would have an opportunity to establish a positive relationship with a new supervisor – in effect, a rehabilitative goal of having Complainant prove that she could be trusted. If Respondent imposed a permanent demotion against Complainant and did not allow her to ever apply for a promotion, it would not only violate Board rules, it would negate one of Abbott's articulated rehabilitative goals in choosing demotion as the disciplinary action.

The issue then becomes <u>when</u> Complainant may apply for a promotion. Two factors should be considered on this matter. The first factor is Abbott's silence on the issue in his notice of disciplinary action. The second factor is the rehabilitative aspect of Complainant's demotion by having her establish a trusting relationship with a new supervisor. Weighing these factors and the Board rule against permanent prohibitions against promotions, it is reasonable to state that Complainant may, at any time, apply for a promotion anywhere within DOC.

Aside from the above issue concerning Complainant's opportunity to apply for a promotion after her demotion, the reasonableness of demoting Complainant must be considered. The credible evidence demonstrates that Abbott made the decision to demote Complainant thoughtfully and with due regard for the circumstances of the situation. Board Rule R-6-6, 4 CCR 801. As both Neal and Complainant stated, Complainant's actions resulted in a severe breach of trust that would have been difficult to mend.

Complainant argues that demotion is too severe a sanction and that, given the IT centralization, she would have been transferred away from Neal's supervision and, therefore, there was no need to demote her in order to achieve that removal. While Complainant would very likely have been removed from working with Neal due to the centralization of the IT functions, the centralization should not take the place of discipline – all of the other DOC IT employees were centralized and their transfers were not characterized as disciplinary.

Complainant argues that the information disclosed by her was already known or would have been; there was no labeling information that the information was sensitive or should not be forwarded; and that there was no demonstrated actual harm. Whether or not the information was already known or would have been, Complainant was not in a position

to make the determination as to how or to whom it should be disseminated. Managers rely on support staff to perform certain functions for them. In order to do so, the staff often knows of confidential or sensitive information. Managers, in order to function efficiently, must be able to trust their support staff not to disclose that information unless directed to do so.

The information that came out of a managers meeting would have been included in a posting of the minutes to which DOC employees had access. However, those minutes would have been drafted, corrected and approved by managers prior to the posting. Even if the layoff information was also contained in a document on Neal's desk, Complainant was in a position of trust in working with Neal and, simply because she was privy to information as a result of that working relationship, she was not the person who was authorized to decide when and how to disseminate the information.

Simply because the information was not labeled as sensitive or confidential or did not contain the caution not to forward does not give Complainant free rein to disseminate that information as she deems appropriate. She was aware of the information, not as the intended recipient, but rather as an emergency conduit for the information being transmitted to Neal.

Finally, the fact that there was, arguably, no demonstrable actual harm that resulted from Complainant's actions does not negate the fact that she committed those acts. If it is accepted that there was no actual harm, then that serves as a mitigation, not a negation, of Complainant's actions.

Amongst the disciplinary options available to Abbott, besides demotion, were suspension for a period of time or termination. Suspension would not have addressed Abbott's goal of having Complainant earn the trust of a new supervisor. In light of Complainant's prior evaluations and previous disciplinary history, termination would have been too severe a sanction. However, given the seriousness of Complainant's action, a corrective action would not have been appropriate. A demotion, with the ability to apply for available promotions in the future, is within the range of reasonable alternatives.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

An award of attorney fees is not warranted in this matter. The parties presented rational arguments and competent evidence to support their claims. In addition, there was

no evidence that would lead to the conclusion that either of the parties pursued this matter in order to annoy, harass, abuse, and be stubbornly litigious or disrespectful of the truth.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

3. The discipline imposed, with the clarification that Complainant is eligible to apply for a promotion in the future, is within the range of reasonable alternatives.

4. Attorney's fees are not warranted.

ORDER

Respondent's action, with the clarification that Complainant is eligible to apply for a promotion in the future, is **affirmed.** Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this ___ day of December, 2003.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 □ inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of December, 2003, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall
3773 Cherry Creek Drive North, Suite 575
Denver, Colorado 80209

and in the interagency mail, to:

Andrew M. Katarikawe
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Andrea C. Woods